SUPREME COURT, U.S. FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 174

O. HENRY TENT & AWNING COMPANY,
A CORPORATION,
Petitioner,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, AND UNITED STATES FIRE INSURANCE COMPANY,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit is respectfully submitted to this Honorable Court on behalf of The Commonwealth Insurance Company of New York, The Continental Insurance Company, Milwaukee Insurance Company of Milwaukee, Wisconsin, and United

States Fire Insurance Company, respondents herein, and is in opposition to the Petition for Writ of Certiorari herein sought to review a judgment of the United States Court of Appeals for the Seventh Circuit.

QUESTION PRESENTED.

Under the law of the State of Illinois, does the doctrine of waiver avail to excuse non-compliance with the Value Reporting Clause of a reporting form fire insurance policy?

STATEMENT OF THE CASE.

Respondents herein adopt as their statement of the case that portion of the opinion of the United States Court of Appeals for the Seventh Circuit rendered on February 21, 1961, written by District Judge Grubb and concurred in by Chief Judge Hastings and Circuit Judge Duffy, which relates the factual circumstances giving rise to this controversy. Said statement of the case is found in Appendix A to the Petition for Writ of Certiorari herein filed by petitioner and appears at pages 1a through 5a of said appendix. (For purposes of brevity, we do not repeat said statement here.)

Respondents are compelled to disregard the statement of the case found in the petition filed herein for the reasons that said statement is clearly recriminatory is at variance with the statement presented by the Court of Appeals for the Seventh Circuit and creates an erroneous impression of the question at issue in that it fails to bring to this Honorable Court's attention the value reporting clause of the policies of insurance upon which petitioner's claim is based, which clause is, of course, the touch-stone upon which any argument herein must be based.

Petitioner states at page 4 of its petition:

> "* * * at no time did the companies advise the petitioner that it was in jeopardy of sustaining a loss in

> the event of fire on account of tardy filing, nor did the insurers warn the petitioners of the adverse consequences that might come into being if a loss occurred and a report was tardy and if the insured had more goods in its premises than that reported in the last previous report filed with the companies."

We respectfully bring to the Court's attention, that, contrary to petitioner's statement, the policy of insurance herein provides *inter alia*:

> "Value Reporting Clause—It is a condition of this policy that the Insured shall report in writing to this Company not later than thirty (30) days after the last day of each calendar month, the exact location of all property covered hereunder, the total actual cash value of such property at each location and all specific insurance in force at each of such locations on the last day of each calendar month. *At the time of any loss, if the Insured has failed to file with this Company reports of values as above required, this policy* subject otherwise to all its terms and conditions, *shall cover only at the locations and for not more than the amounts included in the last report of values* less the amount of specific insurance reported, if any, *filed prior to the loss*. * * *." (Emphasis supplied.)

Clearly, petitioner was "advised" and "warned" of the consequences of its failure to report.

Respondents further respectfully bring to the Court's attention, contrary to petitioner's statement on page 6 of its petition, the fact that respondents attempted to satisfy the judgment herein and to that end presented in the trial court, a judgment order in accordance with the mandate of the Court of Appeals. No action on said order was taken, however, because of petitioner's representation that it would seek a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondents respectfully submit that there is no good reason for this Court to grant the Writ of Certiorari herein sought. There is no federal question presented in this diversity matter. There is no novel question here relative to the supervision of the Courts of Appeals nor is there any conflict of decisions among the Courts of Appeals of the various circuits on any of the issues herein involved nor, for that matter, do the decisions of the various Courts of Appeals which have considered the question herein presented differ in result from the highest tribunals of the various states which have considered the nature and operation of the reporting form fire insurance policy. As there is no vital question presented in this case to which this Honorable Court should devote itself, respondents are compelled to oppose the granting of this writ.

At page 7 of its petition, petitioner states that the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with the decisions of other Courts of Appeals. This is not the fact and, significantly, it should be noted that there is unanimity even though each Court of Appeals which has addressed itself to the question presented here has considered said question in the light of the law of the state from which the cause before it arose.

Simply stated, the question presented here is whether, under the law of Illinois, the doctrine of waiver avails to excuse non-compliance by an insured with a clause of its policy requiring it to report values prior to the attachment of coverage. Every case which has considered this question in relation to the reporting form fire insurance policy has held that the last report of value filed prior to loss is binding upon the insured and that the requirement for submission of a report cannot be waived. *Peters* v. *Great*

American Ins. Co., 177 F. 2d 773 (4th Cir.); *Carmilla Feed Mills* v. *St. Paul Fire & Marine Ins. Co.*, 177 F. 2d 746 (5th Cir); *Wallace* v. *World Fire & Marine Ins. Co.*, 70 F. Supp. 193, aff'd. 166 F. 2d 571 (9th Cir.); *Albert* v. *Home Fire & Marine Ins. Co.*, 275 Wis. 280, 81 N. W. 2d 549.

Columbia Fire Insurance Co. v. *Boykin & Taylor*, 185 F. 2d 771 (4th Cir.) and *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26 (10th Cir.), cited by petitioner at pages 7, 12 and 13 are not contrary. In both of these cases there was a waiver not of the requirement that a report be submitted, but of the mechanics by which the report was to be submitted. In both cases reports were made by insureds to agents of the insurers and were accepted by said agents although the reports were not in the form desired by the insurers. The acceptance by the respective agents was held to be a waiver of a properly submitted written report. In the instant case, the form of the report was not in issue.

Likewise in *Aetna Insurance Co.* v. *Rhodes*, 170 F. 2d 111 (10th Cir.) cited by petitioner at pages 7 and 10, the court held that the value of merchandise fixed in the policy on the date of its issuance constituted a report in the event that no further reports were filed, thus preventing forfeiture of a policy. In the case at bar, the insurance policy specifically provides for the contingency which led to the *Rhodes* case.

The language of the Court of Appeals for the Fourth Circuit in *Columbia Fire Insurance Co.* v. *Boykin & Taylor*, 185 F. 2d 771 at page 776 is particularly apt here and should be dispositive of petitioner's claim. The Court therein stated:

> "Since the insured has the right, if it sees fit, to omit making a monthly report and thereby reduce its insurance, the insurer may well infer that the insured

> desires to limit its insurance to the amount shown by the insured's latest report, and consequently, there is no duty on the insurer to jog the memory of the insured."

Schenley Distillers Corporation v. *United States Fire Ins. Co.*, 90 F. 2d 633 (2nd Cir.), cited by petitioner at page 7 and 14 and *Hoffstatter and Guth* v. *Home Insurance Co. of New York*, 22 F. 2d 882 (5th Cir.), cited by petitioners at page 15 are inapposite here. Neither of these cases pertain to the reporting form fire insurance policy. This is made clear insofar as *Schenley* is concerned by the opinion of the Court below at page 7a of the appendix to the petition. *Hoffstatter* was not relied upon in the court below by petitioner prior to its petition for rehearing. That case involved a specially drafted "floater" policy and not the standard reporting form fire insurance policy.

The above cases on the reporting form fire insurance policy were all before the Court below. It is clear from the court's opinion that they were considered. In addition all of the cases from Illinois cited by petitioner at pages 9, 10 and 11 were cited to the Court below in its brief and were further brought to the Court's attention on oral argument. All of the cases from Illinois concerning waiver of conditions concerned waiver of conditions *subsequent* to the attachment of coverage. These cases are thus inapposite here where the condition in issue goes directly to the coverage afforded by the policy. It is the law of Illinois, and in fact of all other jurisdictions, that provisions of an insurance policy going to the attachment of coverage cannot be waived nor can a new policy creating different coverages be created by the doctrine of waiver and estoppel. *Peters* v. *Great American Ins. Co.*, 177 F. 2d 773 (4th Cir.) (considering the precise question herein involved); *Spence* v. *Washington National Ins. Co.*, 320 Ill. App. 149, 50 N. E. 2d 128 (stating the law of Illinois

and relied on by the Court below at page 6a; *Ehert v. Home Fire and Marine Ins. Co.*, 275 Wis. 280, 81 N. W. 2d 549 (considering the reporting form policy herein involved and decided by the court of last resort of the state of Wisconsin, a jurisdiction within the Seventh Circuit); Annotation, Waiver Or Estoppel In Respect of Scope Or Limitation of Coverage of Insurance Policy As Distinguished From Waiver Or Estoppel as Grounds of Forfeiture Or Defense, 113 A. L. R. 857, 858.

In the light of the foregoing, respondents respectfully submit that petitioners here seek nothing but a second review of this cause, which under the appropriate rule of law, must lead to affirmation of the decision of the Court below.

Respondents respectfully submit that the decision below creates no uncertainty and affects adversely no rule of law as applied to both insureds and insurers connected with the reporting form policy. Further review by this Court can serve no purpose but to place this Court's imprimatur on a matter of state law which has been consistently resolved in accordance with the position asserted by respondents here and adopted by the Court below.

CONCLUSION

For the foregoing reasons respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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